Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 10
Date: March 31, 2022
File No.: T2459/1620

Between:

Cathy Woodgate, Richard Perry, Dorothy Williams, Ann Tom, Maurice Joseph and Emma Williams

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Amended Ruling

Member: Colleen Harrington

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I. Introduction

[1] A.B. filed a Motion for a confidentiality order under section 52 of the *Canadian Human Rights Act,* RSC 1985, c.H-6 (*CHRA*) on February 24, 2022. As part of the confidentiality order sought in that Motion, he is asking that the Tribunal anonymize his name and that there be a publication ban on any information that would tend to identify him or his family members in relation to this proceeding. On March 17, 2022, he provided additional submissions supporting his request for an interim publication ban on his name and any information that would tend to identify him in relation to this inquiry until such time as his confidentiality motion (including the publication ban sought therein) is determined.

[2] A.B. is not a party in this matter. Rather, in a Ruling dated January 24, 2022 I granted him limited standing in this proceeding as an "interested person" for two purposes: (i) to apply for confidentiality in the inquiry pursuant to section 52 of the *CHRA*; and (ii) to provide evidence, if requested, relevant to the issue of documents allegedly produced in this proceeding that were subject to an implied undertaking to the British Columbia Supreme Court. In my January 24th Ruling I determined that, until these issues are decided, the Tribunal's public record is to remain sealed.

[3] Following an inquiry by counsel for the Aboriginal Peoples Television Network (APTN) about the sealing order, I requested submissions from the parties and A.B. on the question of whether the media should be given notice of the publication ban applications. A.B. and the parties all agree that notice should be given. However, there is some disagreement as to how broad the notice should be and the extent of materials that should be provided to any media outlet that wishes to respond to the publication ban applications. Their submissions raise the following issues, which are determined in this Ruling.

II. Issues

[4] Should the media be provided with notice of A.B.'s application for confidentiality measures in this proceeding, including the publication bans sought?

[5] If so, should notice be given only to APTN or to other media outlets as well?

[6] If, after notice is given, the media wish to respond to the publication ban applications, should they be provided with submissions that redact certain information as proposed by A.B.?

III. Positions of the Parties and the Interested Person

A. A.B.

[7] A.B. submits that notice should be given only to APTN and not to other media outlets, and that any materials provided to the media to respond to his motion should be redacted.

(i) Notice to APTN only

[8] In his March 17, 2022 submissions, A.B. agrees that APTN's interests may be directly affected by any publication ban ordered in these proceedings, given its request to broadcast the hearing.

[9] He takes the position that notice to other media outlets is unnecessary and inconsistent with the Tribunal's objectives of proceeding informally and expeditiously.

(ii) Redacted materials

[10] A.B. suggests that a redacted version of his s.52 motion materials be provided to APTN, without the affidavits filed in support of the motion. He proposes to redact only highly personal information contained within the affidavits, arguing that this is required to protect his privacy interests while at the same time providing sufficient information for APTN to make informed submissions on any proposed publication bans. He provided the Tribunal and the parties with the proposed redactions on March 22, 2022, as requested by the Tribunal.

[11] He also argues that these materials should be made available to counsel for APTN on a strictly limited "for counsel's eyes only" basis. If it is necessary for a client representative to view the submissions, he argues that this should be done on an undertaking not to publish any information derived from the contents of the submissions.

[12] Finally, he suggests that, if APTN applies to participate and make submissions on the publication ban, an oral hearing should be held on that issue permitting all parties to be heard.

B. Canadian Human Rights Commission

[13] In submissions provided March 24, 2022, the Canadian Human Rights Commission (CHRC) says it takes no position with respect to A.B.'s argument that APTN should receive a redacted version of his s.52 motion submissions.

[14] The Commission agrees that proceeding with notice to the media as proposed by A.B. is appropriate, noting the importance of the open court principle, A.B.'s agreement to provide notice to APTN, and the fact that the Tribunal is the master of its own proceedings.

[15] The Commission also suggests the matter could proceed expeditiously with written submissions, as an oral hearing is not necessary.

C. RCMP

[16] The Respondent has indicated that it also agrees with A.B.'s proposal about issuing notice to the media.

D. Complainants

(i) Notice to APTN only

[17] The Complainants disagree with A.B.'s proposal that notice only be given to APTN. Rather, they submit that notice about the requested publication bans should be provided "to all media outlets".

[18] The Complainants rely on *Named Person v Vancouver Sun*, 2007 SCC 43 to suggest that the Tribunal cannot restrict notice to certain media outlets only.

[19] They also rely on *British Columbia (Environmental Management Act) v CNR*, 2022 BCSC 135 to argue that any concern regarding delay is not an adequate reason for deciding against giving notice to the media.

(ii) Redacted materials

[20] The Complainants do not agree that the media should be provided with a redacted version of A.B.'s s.52 motion submissions. They submit that doing so would impair the media's ability to make fully informed submissions to the Tribunal, thereby obstructing their ability to advance a rigorous and fulsome representation of the public's interest in response to A.B.'s application to limit court openness. The Complainants state: "There should be a fair opportunity for all perspectives of the public to be advanced for the Tribunal's consideration".

[21] The Complainants are not opposed to an interim publication ban until the Tribunal makes its decision on the s.52 motion. However, they also argue that counsel for the media outlets would be bound by the ongoing sealing order, and therefore A.B.'s private information would not be revealed to the public.

[22] Finally, the Complainants oppose A.B.'s proposal to have the media's submissions be heard orally because of the potential delay in trying to schedule an oral hearing.

E. A.B.'s reply to the Complainants

(i) Notice to APTN only

[23] In his reply submissions of March 28, 2022, A.B. reasserts that notice to other media outlets is unnecessary.

[24] He notes that there is no common law requirement that notice be given to the media, nor is there a presumption in favour of giving notice to the media ((*BC (Environmental Management Act) v CNR, ibid* at paras 124 and 125). He also notes that there is no statutory requirement in the *CHRA* that notice be given to the media, nor has the Tribunal by standard procedure or representation provided any basis for media entities to have any legitimate

expectation of receiving unsolicited notice of publication ban applications (*Agraira v Canada (Minister of Public Safety and Emergency Preparedness*), 2013 SCC 36 at paras 94-97).

[25] A.B. argues that, while other media entities are aware of the Tribunal's inquiry into this complaint and have even reported on it, only APTN has given the Tribunal notice of its interest in reporting directly on the hearing. He suggests that media entities who have not notified the Tribunal of their interest in reporting on its proceedings should not expect to receive notice of any application for a publication ban.

[26] A.B. notes that, in deciding whether to give notice of application for publication bans to the media, courts have considered the following factors:

- the role served by the media in supporting the open court principle;
- whether notice would delay the application;
- whether any parties oppose the publication ban application such that an adversarial context is likely to be created even if the media is not notified;
- potential significance of the underlying case;
- whether there are logistical barriers to giving notice to the media; and
- the potential for notice to adversely affect any parties (*British Columbia (Securities Commission) v BridgeMark Financial Corp.*, 2020 BCSC 527 at para 11).

[27] A.B. argues that providing notice only to APTN sufficiently supports the open court principle and enables APTN to seek to join the Complainants' opposition to the publication ban sought, thus ensuring an adversarial context and that the media's interests are represented.

[28] He says that there are significant logistical barriers to notifying "all the media outlets" as requested by the Complainants. He also alleges that there is substantial potential for notice to adversely affect him because further dissemination of information related to this case risks further affront to his dignity and reputation.

(ii) Redacted materials

[29] A.B. says it is imperative that notice to the media and any materials provided to them be subject to a publication ban and be redacted as proposed. He says that the personal medical and financial information he proposes to redact, as well as the anticipated evidence of the Complainants that is not yet public, are severely prejudicial to him. He says that, if these protections are not put in place, “there is a realistic risk that APTN may publish the content of these materials, defeating both the interim confidentiality and sealing order put in place on January 24, 2022” by the Tribunal. He says the redactions are necessary to prevent him from experiencing undue hardship.

[30] A.B. asserts that APTN can determine whether to participate and make submissions on the publication ban application on the basis of the redactions he proposes. He argues that the media frequently participate meaningfully in applications for publication bans without being provided with confidential information and that they only need to have sufficient information with respect to the proposed grounds for the order so they can make effective submissions on the necessity for the order and its scope. He asserts that the redactions allow the media to know the “three social values of superordinate importance engaged: the protection of the innocent, privacy and an affront to dignity, and reputation”.

IV. Analysis

A. Should the media be provided with notice of A.B.’s application for publication bans in this matter?

[31] I agree that notice of the applications for publications ban should be provided to the media in this case. While the parties and A.B. agree that notice should be given, at the very least, to APTN, I note that notice to the media is not mandatory. There is no requirement, under statute or common law, for the Tribunal to give the media the opportunity to respond to a request for a sealing order or publication ban pursuant to s.52 of the *CHRA*. This is a discretionary decision for the Tribunal – as master of its own proceedings – to make. Each case must be considered on its own facts. The Supreme Court confirmed this in *CBC v Manitoba*, 2021 SCC 33:

> **51** To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

[32] In this case, APTN has applied to broadcast the hearing and I agree that, as such, its interests may be directly affected by a publication ban. While section 52 of the *CHRA* requires the Tribunal to consider the fundamental importance of the open court principle in all cases, I accept that the Tribunal would benefit from the input of the media with respect to the proposed publication ban, given the broader public interest expressed through the media in this case to date.

B. Should notice be given only to APTN or to other media outlets as well?

[33] A.B. argues that only APTN need be given notice of his application for a publication ban, while the Complainants argue that notice should be given to “all media outlets”. It is clear that any decision about the extent of the notice to be given to the media is also within the Tribunal’s discretion to control its proceedings. None of the case law cited by the parties leads me to conclude that the discretion to give notice must be exercised in an all-or-nothing way. In *Named Person v Vancouver Sun,* the judge had decided to give notice only to media identified by the *amicus*. The Supreme Court said: “This practice cannot be supported, as it unfairly and arbitrarily privileged certain members of the media on the basis of the judge’s views. … [T]he notice to the media, if given, ought to be justified, and made in a public manner to all interested parties” (para 64).

[34] The Complainants have not provided a list or a suggestion as to how the Tribunal should give notice to “all media outlets”. The Tribunal has no rules relating to notice to the

media and does not keep a list of “all media outlets”, as it is not its practice to provide such notice when asked to make a decision pursuant to section 52 of the *CHRA*. Practical realities must be considered along with the Tribunal’s statutory obligation to proceed “as informally and expeditiously as the requirements of natural justice and the rules of procedure allow” (s.48.9(1) *CHRA*). The Tribunal’s Registry does not have adequate resources to compile a list of every media outlet and their contact information in a reasonable amount of time, and the steps required to post a notice on the Tribunal’s website would cause further delay of this inquiry while achieving only a minimal form of notice.

[35] While none of the parties has suggested a middle ground, I am of the view that providing notice to those media outlets that have contacted the Tribunal for information about this inquiry is a reasonable way to proceed. While only APTN has raised the issue of notice to the media in this case, I note that both The Tyee and CBC have recently inquired about the sealing order currently in place that prevents them from accessing information in the Tribunal’s record. While they have not directly challenged the sealing order as APTN has, they have expressed an interest in reporting on the hearing of this case.

[36] A.B. raises delay as a reason to limit notice to APTN only. However, it is the Complainants who are suffering most from delays in this case, and they argue that delay is not an adequate reason to deny notice to the media. Their concern is not simply to move the matter along quickly, but also for there to be transparency and the benefits of open court present during this inquiry. I am of the view that notice to the three media outlets that have contacted the Tribunal to identify an interest in this case - APTN, The Tyee, and CBC – would not cause undue delay, and is reasonable in the particular circumstances of this case.

C. Should any media that express an interest in responding to the publication ban application be provided with submissions with certain information redacted, as proposed by A.B.?

[37] A.B. argues that the media must be provided with the redacted version of his s.52 motion submissions in order to protect his privacy interests. He says the redacted materials will still provide the media with sufficient information to make informed submissions on any proposed publication bans.

[38] I am of the view that, should any of the three media outlets to whom notice is to be given express interest in responding to the publication ban applications, both this Ruling and the s.52 motion materials should be provided to them in unredacted form, although I agree that the affidavits filed with A.B.'s submissions need not be disclosed.

[39] If I were to agree to redact the motion materials as proposed by A.B., this would adversely affect the media's ability to know what arguments he is making in support of his request to limit the open court principle. In particular, he appears to raise s.52(1)(d) of the *CHRA* in his confidentiality motion, suggesting there is a serious possibility that his life will be endangered through "an increased risk of suicide" if the publication ban is not made. The information that he is proposing to be redacted from his motion materials speaks to this argument and raises the need for more focused legal argument and precedents. Permitting the redactions would greatly limit the ability of the media to understand and respond to his s.52 arguments. However, I do not believe that the media would require the affidavits, at least on an initial basis, to understand A.B.'s position in his confidentiality motion. If the affidavits are later specifically requested by legal counsel, I will consider this request at that time.

[40] I also agree that all materials provided to the media in order to respond to the publication ban application, as well as this Ruling, should be made available on a strictly limited "for counsel's eyes only" basis.

[41] In providing notice to the media of the applications for publication bans, the Tribunal will inform them of the conditions imposed in order to permit them to participate, which would include "for counsel's eyes only" and an agreement not to publish any information derived from the contents of the submissions or this Ruling. A.B.'s name will also be anonymized as "A.B." when providing notice to the media. Such conditions will limit A.B.'s exposure very significantly. I have no reason to believe that any media outlet will breach the conditions imposed in order to participate in this process.

[42] Finally, I note that, while A.B. argues that the materials included in his s.52 motion were provided on the "explicit understanding that they would be filed under seal", it has always been clear that the sealing order was temporary. He himself has raised the question

of interim and ongoing publication bans, which are well known to trigger notice to media, as well as submissions from media expressing interest.

V. Amended ORDER

[43] The Tribunal orders that:

a. The name of the interested person will be temporarily anonymized in this Order to "A.B.", pending determination of A.B.'s confidentiality motion of February 24, 2022;

b. A.B. has applied for interim and ongoing publication bans on A.B.'s identity and all information that would tend to identify A.B. or A.B.'s family in relation to this inquiry. For this reason, the interim sealing order that is currently in place is varied by this order. In all other respects, the interim sealing order remains in place;

c. The Tribunal's Registry shall immediately provide a copy of this order only, without the preceding text in the Ruling, to APTN, CBC, and The Tyee;

d. The above media outlets have until 5:00 p.m. EDT on April 6, 2022 to notify the Tribunal as to whether they wish to make submissions on the February 24, 2022 confidentiality motion brought by A.B. Media representatives providing such notice to the Tribunal's Registry should include the name and contact information of their legal counsel in order to receive further information relating to the motion;

e. The Tribunal's Ruling from which this Order issues and any material provided in relation to A.B.'s confidentiality motion of February 24, 2022 will be provided to any of the above media outlets that notify the Tribunal of their intention to make submissions on the confidentiality motion on a "for counsel's eyes only" basis. No one may publish, broadcast or disseminate any of the information contained in the Ruling or in any parties' submissions or any information derived from the contents of the submissions to the confidentiality motion of February 24, 2022 in any way that could defeat the purpose of the publication bans being sought;

f. Anyone receiving notice of the applications for interim and ongoing publication bans through this Order may only use the information in this Order for the sole purpose of deciding whether or not they wish to make submissions on the February 24, 2022, confidentiality motion. No one may publish, broadcast or disseminate any of the information in this Order in any way that could defeat the purpose of the publication bans being sought;

g. To prevent further delay of this inquiry, all submissions relating to the confidentiality motion of February 24, 2022, will be in writing.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
March 31, 2022
Amended April 4, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2459/1620

Style of Cause: Woodgate et al. v. RCMP

Ruling of the Tribunal Dated: March 31, 2022, Amended April 4, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Karen Bellehumeur and Angeline Bellehumeur, for the Complainants

Christine Singh and Jessica Walsh for the Canadian Human Rights Commission

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Claire Hunter for the Interested Person